

NO. \_\_\_\_\_

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IN THE  
SUPREME COURT OF THE UNITED STATES

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FRANCISCO PENA, JR.,

PETITIONER,

vs.

UNITED STATES OF AMERICA,

RESPONDENT.

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On Petition For a Writ of Certiorari to  
the United States Court of Appeals  
for the Fifth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

1. Do the Fifth and Sixth Amendments prohibit a federal judge from imposing a sentence, based on a defendant's uncharged conduct found by the judge by a preponderance of the evidence, higher than the sentence the judge would have imposed absent consideration of that uncharged conduct?

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## PETITION FOR A WRIT OF CERTIORARI

Petitioner, Francisco Pena, Jr., respectfully petitions for a writ of certiorari issue to review the Judgment of the United States Court of Appeals for the Fifth Circuit, entered on October 18, 2019.

### OPINION BELOW

The unpublished opinion of the United States Court of Appeals for the Fifth Circuit *United States v. Francisco Pena, Jr.*, No. 18-11329 (5th Cir., October 18, 2019), is reproduced in the Appendix. (Pet. App. 1a-3a).

### JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1) to review the circuit court's decision on a writ of certiorari.

### CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Due Process Clause of the Fifth Amendment to the Constitution of the United States which provides in relevant part that:

"[no] person shall be...deprived of life, liberty, or property without due process of law."

2. This case also involves the Jury Trial Clause of the Sixth Amendment to the Constitution of the United States which provides in relevant part that:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury [.]"

STATEMENT OF THE CASE

FRANCISCO PENA, JR. was charged on May 8, 2018 in a one count Information in the Northern District of Texas, Fort Worth Division with Possession With Intent to Distribute a controlled substance in violation of 21 U.S.C. § 841(a)(1) and 841(b)(1)(C). The Information described a single offense occurring on a single day and there was no allegation of a conspiracy or of joint criminal conduct. The Information did not specify the drug quantity. On May 18, 2018, Pena pleaded guilty to the offense without a written plea agreement.

The Presentence Investigation Report ("PSR") calculated the drug quantity based on the actual amount of drugs seized on the day of the charged offense, and added drug quantities from a description of "estimated" drug quantities from a "Cooperating Defendant" interview as contained in a Report of Investigation prepared by federal law enforcement officers. No drugs were seized in connection with these uncharged estimated amounts, which allegedly involved drugs over a period of many months prior to the actual offense nor was the "cooperating defendant" identified. The PSR described a person as being an "unindicted coconspirator" in connection with these uncharged drug possessions,

leaving it unclear whether this was the same person earlier described in the PSR as a "Cooperating Defendant" or a different person. There was no conspiracy, so the inclusion of a "coconspirator" may have been designed to suggest that the co-conspirator hearsay rule was applicable, making the "estimate" by the unidentified source more reliable. The use of these "estimated" quantities of drugs alleged to have been involved in the uncharged conduct more than doubled the drug quantity and raised the offense level calculation by 2 levels. In a federal drug case, the quantity of drugs as calculated in the PSR is the major driver of the length of the sentence.

Counsel objected to the PSR's calculation of the uncharged conduct drug quantity on 5th Amendment and 6th Amendment grounds. A Second Addendum to the PSR was filed on September 26, 2018, two days before sentencing. Federal Rule of Criminal Procedure 32 (g) provides that the PSR "and an addendum containing any unresolved objections, the grounds for those objections, and the probation officer's comments on them" *must* be submitted to the court and the parties "at least 7 days before sentencing." This was not done. While it is unclear, it appears that this 7 day period cannot be waived in the case of the addendum. The defendant did not waive

this 7 day period.

At sentencing, the district judge asked if counsel was "pursuing" these objections and if counsel "agree[d]" that the Government's response and the Probation Officer's response to the objections "adequately answered why those objections are without merit," but never used the words "waived," "withdraw" or "abandon" with respect to petitioner's objections and never inquired if the defendant agreed to this, or made certain the defendant understood the actions and the significance of them. There was nothing during this inquiry at sentencing to insure that the actions of counsel with respect to the defendant's objections were understood and consented to by the defendant. On September 28, 2018, petitioner was sentenced to 188 months in prison.

Petitioner appealed his sentence, arguing that the sentencing court's consideration of uncharged conduct violated the Fifth and Sixth Amendment guarantees of due process and right to a jury trial. The Fifth Circuit affirmed Pena's conviction in an opinion which concluded that Pena waived his objections to the Presentence Report's calculation of drug quantity by not "pursuing" his objections at sentencing and that his claim that his sentence violated the Sixth Amendment by reason of enhancement of his

sentence based on uncharged conduct occurring prior to the offense of conviction, and Fifth Amendment due process by the use of the preponderance of the evidence standard in finding the drug quantity involved in the uncharged conduct, was foreclosed by Fifth Circuit precedent. App. 2a-3a.

#### REASONS FOR GRANTING THE WRIT

##### **I. The Fifth Circuit Court of Appeals Has Decided an Important Question of Federal Law that Has Not Been, But Should Be Settled by this Court.**

Under *United States v. Watts*, 519 U.S. 148, 157 (1997), a jury's verdict of acquittal does not prevent the sentencing court from considering conduct underlying dismissed charges that a jury had considered and of which it had acquitted a defendant, so long as that conduct was supported by a preponderance of the evidence.

However, since *Watts* the Court, and a number of circuit courts have raised questions about the limitations on judicial fact-finding, particularly those based on Fifth Amendment due process concerns and Sixth Amendment jury trial rights concerns. In *Alleyne v. United States*, 133 S. Ct. 2151 (2013), the Court held that the Sixth Amendment does not allow a judge, absent a jury, to find any fact that "alter[s] the prescribed range of

sentences to which a defendant is exposed and do[es] so in a manner that aggravates the punishment." *Id.* at 2158. And, in a dissent from the denial of certiorari in *Jones v. United States*, 135 S.Ct. 8, 9 (2014), Justice Scalia (joined by Justices Ginsburg and Thomas) argued that judicial fact-finding justifying a sentence that would be unreasonable but for the judge-found facts may run afoul of the Sixth Amendment.

A number of circuit opinions have also highlighted issues with the use of uncharged and acquitted conduct in sentencing. *See, United States v. Canania*, 532 F.3d 764, 776 (8th Cir. 2008)(Bright, J., concurring)("[W]e have a sentencing regime that allows the Government to try its case not once but twice. The first time before a jury; the second time before a judge."). And in *United States v. Bell*, 808 F.3d 926 (D.C. Cir. 2015), then-judge Kavanaugh observed that "[a]llowing judges to rely on acquitted or uncharged conduct to impose higher sentences than they otherwise would impose seems a dubious infringement of the rights of due process and to a jury trial." *Id.* at 928 (Kavanaugh, J., concurring in denial of rehearing en banc).

1. Allowing Judges to Rely on Uncharged Conduct to Impose a Higher Sentence than they Otherwise Would Impose Infringes the Rights of Due Process and to a Jury Trial.

The district judge in petitioner's case imposed a sentence that was significantly enhanced by judge-found facts consisting of "relevant conduct" based on uncharged conduct allegedly occurring prior to the date of the offense of conviction. The offense of conviction was a single, discrete act occurring on March 7, 2018, in which there was a seizure of a specific amount of methamphetamine. The judge found "relevant conduct" based on a cooperating defendant's information contained in a Report of Investigation summarizing an interview with the cooperating defendant, written by the Government investigators. The conduct was not charged in the Information nor was it specific as to dates or quantities of drugs, but consisted of "estimates" based on the estimated drug quantities of earlier transactions multiplied by the estimated number of occurrences. There were no seizures of any drugs relating to this "relevant conduct" information. Based on the district judge's finding that this relevant conduct was reliable, under a preponderance of the evidence standard of the Sentencing Guidelines, the judge more than doubled the drug quantity and increased the petitioner's offense level by 2 levels, adding approximately 4 years of

imprisonment, based only on the judge-found facts. There was no testimony by any investigators or the unidentified cooperating defendant at sentencing. The petitioner did not admit the "facts" embodied in the relevant conduct as found by the judge.

Due process "guarantees every defendant a right to be sentenced upon information which is not false or materially incorrect." *United States v. Tavano*, 12 F.3d 301, 305 (1st Cir. 1993). *See also, United States v. Galbraith*, 200 F.3d 1006, 1012 (7th Cir. 2000) (a defendant has a due process right to be sentenced on the basis of reliable information). Any judicial fact-finding by a preponderance of the evidence which increases a defendant's sentence is constitutionally suspect. Some commentary suggests that any judicial fact-finding which meaningfully increases a defendant's sentence can be viewed as constitutionally suspect in light of the Sixth Amendment principles established in the *Apprendi* line of cases. *See, e.g.*, Barry L. Johnson, *The Puzzling Persistence of Acquittal Conduct in Federal Sentencing, and What Can Be Done About It*, Suffolk Univ. L. Rev. Vol. XLIX, No. 1, p. 29-31 (2016).

2. The United States May Not Presume a Person, Adjudged Guilty of No Crime, "Guilty Enough" for Imprisonment Exactions.

In *Nelson v. Colorado*, 137 S.Ct. 1249 (2017), the Court found that acquitted conduct restores a defendant to the status of "presumed innocent" for conduct for which the defendant was acquitted. *Nelson*, 137 S.Ct. at 1256. The presumption of innocence "lies at the foundation of our criminal law." *Coffin v. United States*, 156 U.S. 432, 453 (1895). As this Court said in *Nelson*, Colorado may not retain funds from a person solely because of their now-invalidated convictions "...for Colorado may not presume a person, adjudged guilty of no crime, nonetheless guilty enough for monetary exactions." *Nelson*, 137 S.Ct. at 1256.

To the Government, "relevant conduct" is more than simply a factor to consider at sentencing. It is "a principle that impacts nearly every aspect of guidelines application." *See*, Primer on USSG Prepared by the Office of the General Counsel for the US Sentencing Commission, March 2018, p. 1. It cannot be denied that the use of "relevant conduct" in sentencing results in punishment for acts for which a defendant has not been convicted of, or admitted. "[A]ny amount of actual jail time has... significance." *Glover v. United States*, 531 U.S. 198, 203 (2001). Any judicial fact-finding by a

preponderance of the evidence which increases a defendant's sentence is constitutionally suspect. If acts of "relevant conduct" were never proven or admitted, the defendant's presumption of innocence as to those acts still applies and he cannot be punished for those acts, for he is a non-criminal with respect to those acts--he neither admitted the acts nor was he found to have committed them. Here, Petitioner was never found guilty of the acts of relevant conduct and never admitted them, but yet was "guilty enough" to be imprisoned for additional time for those acts. A defendant who is convicted of one crime thereafter stands in jeopardy of being punished further for a sort of "quasi-conviction" by a judge based on a preponderance of the evidence for something that was not part of the charged offense, if the prosecutor can find relevant conduct that satisfies a preponderance of the evidence. If the United States cannot "presume a person, adjudged guilty of no crime, guilty enough for monetary exactions," surely a person charged and convicted of no crime should not be "guilty enough" to be imprisoned for a longer sentence based on "relevant conduct" simply because the Sentencing Guidelines seemingly authorize it. Such use of uncharged relevant conduct is unfair, a violation of Fifth Amendment due process and Sixth Amendment jury trial rights and results in a "stacked deck" producing

higher sentences using a lower standard of proof, all of which were probably never contemplated as being possible by most defendants at the time of their plea or conviction for another crime.

3. A Sentencing Judge Should Not Be Allowed to Consider Conduct for Which a Defendant Has Not Been Convicted and Increase a Defendant's Sentence Based on Such Conduct.

Petitioner was sentenced, based in part on uncharged conduct which involved drug quantities "estimated" by a cooperating defendant for acts for which petitioner was not found guilty, was not charged with, and did not admit. Making the Sentencing Guidelines "effectively advisory" as a result of *United States v. Booker* did not make the Guidelines free of constitutional defect. The Constitution's presumption of innocence continues to stand in the way of the Sentencing Guidelines' use of relevant conduct to punish a defendant, officially accused and convicted of one specific crime, for another crime based on a preponderance of the evidence as found by a judge. That presumption of innocence is a part of due process and "lies at the foundation of our criminal law." It has been noted that it would be constitutionally intolerable, amounting "to a lack of fundamental fairness," for an individual to be convicted and "imprisoned for years on the strength of the same evidence as would suffice in a civil case." *In re Winship*, 397

U.S. 358, 364 (1970). And yet, that is what is "effectively" happening, whether the Guidelines are "mandatory" or "advisory."

CONCLUSION

For the foregoing reasons, Petitioner respectfully submits that the petition for writ of certiorari should be granted.

DATED: January 14, 2020

Respectfully submitted,

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